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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RUTH COLLINS,

Plaintiff and Respondent,

v.

WILLIAM H. McILHANY, Individually
and as Trustee, etc.,

Defendant and Appellant.

B200696

(Los Angeles County
Super. Ct. No. BC346013)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tricia A. Bigelow, Judge. Affirmed.

Del Tondo & Sheehan and Douglas J. Del Tondo for Defendant and Appellant.

The Law Office of John Derrick and John Derrick for Plaintiff and Respondent.

Ruth Collins established that Harrison A. Baker, Jr. orally promised to bequeath her the house she rented from him. She prevailed in this action for quantum meruit against William H. McIlhany, beneficiary and trustee of Baker's trust, and recovered the value of services she rendered to Baker in anticipation of this gift. McIlhany appeals, contending the trial court exhibited gender bias against him, the evidence was insufficient to support the judgment, and the court erred in its application of certain Probate Code provisions. We affirm.¹

FACTUAL AND PROCEDURAL BACKGROUND

The trial court summarized the factual setting for this lawsuit as follows: "The case emanates from the disposition of the real and personal property of Harrison Baker (Baker), who died on July 1, 2005. When he died, Baker had almost \$1 million in liquid assets as well as two homes worth more than \$3 million. Baker had no familial heirs, and defendant contends Baker left almost all he owned to him via a trust and will. Defendant personally prepared the will and trust and it was only fully executed merely days before [Baker] died of merkel cell cancer, while Baker was heavily medicated. The will left defendant all of Baker's liquid assets and his home on Rodeo Drive in Beverly Hills . . . which defendant sold for \$2.2 million. . . . [¶] Plaintiff seeks more than \$2.2 million dollars in quantum meruit damages. She contends Baker promised to give her the Rodeo home in exchange for: (1) preparing the home for Baker to live there to fulfill Baker's dying wish; (2) caring daily for Baker for approximately two years; (3) maintaining and repairing the property; and ([4]) providing a lifetime of care for Baker's beloved dog Rusty."

Procedurally, this action began as one for quiet title in the Rodeo Drive property, quasi-specific performance of a contract to make a will, and cancellation of the grant

¹ By separate orders, appellant's motions for judicial notice and to take evidence on appeal were denied and respondent's motion to strike portions of appellant's opening brief was granted.

deed Baker signed the week before his death transferring the Rodeo Drive property from himself to the Harrison Baker, Jr. trust (Trust). Collins was represented by counsel. McIlhany, individually and in his capacity as trustee of the Trust, was represented by the attorney who currently represents him in this appeal. His demurrer was sustained, and Collins was given leave to amend.

The first amended complaint included the previously pleaded cause of action for quasi-specific performance of a contract to make a will and a second cause of action for quantum meruit. The court sustained McIlhany's demurrer to the quasi-specific performance cause of action without leave to amend; and McIlhany, again individually and in his capacity as trustee of the Trust, answered the quantum meruit cause of action. In the eighth affirmative defense, he alleged "this Court does not have jurisdiction over the matters alleged . . . [because] plaintiff failed to file a claim in probate for quantum meruit before filing this action."

The matter was tried to the court, with both parties representing themselves.² The trial testimony is detailed in the court's final decision. Suffice it to say, plaintiff and her witnesses testified to the close relationship between Collins and Baker, all she did for him while he was alive and in his final illness, and his consistent promises to leave her the Rodeo Drive home she had rented from him since 1999. Defendant and his witnesses testified to the close relationship between McIlhany and Baker, all McIlhany did for Baker while he was alive and in his final illness, and Baker's consistent wish that the Rodeo Drive home be left to McIlhany. Each side presented evidence designed to attack the other's credibility.

The trial court found McIlhany "totally lacking in credibility" and awarded Collins \$111,124 against him personally and as trustee for the reasonable value of Collins'

² Neither Collins nor McIlhany is an attorney. Collins is a film actress. McIlhany is a consultant for television programs about the history of magic and operates two nonprofit corporations. Both Collins and McIlhany are represented by counsel on appeal.

services to Baker.³ Those services included Collins’ care of Baker, her continuing care of his dog, and her repairs to the Rodeo Drive house (Baker expressed the wish to die in that home, and Collins made numerous repairs to accommodate him in his final illness. He died before his wish could be fulfilled).

ANALYSIS

I. The Record Does Not Demonstrate Gender Bias by the Trier of Fact.

McIlhany first seeks reversal on the basis the trial court’s tentative decision demonstrated gender bias against him.⁴ Reversal for a judge’s gender bias is “required . . . where it is ‘reasonably clear that [the trial judge] entertained preconceptions about the parties because of their gender . . . [which make] it impossible for [a party] to receive a fair trial. [Citation.]’” (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 245.) Reversal does not depend on a finding of actual bias; the standard is whether “the average person could well entertain doubt whether the trial judge was impartial,” without determining whether there was actual bias or whether the bias affected the outcome. (*Id.* at p. 247.)

In both the tentative and final decisions, the trial court found “defendant completely lacking in credibility. Defendant has an obvious and significant bias given that the case threatens his inheritance from Baker. In the past 13 years, defendant has not made any significant amount of money from anything other than inheritances or the

³ The court’s decision notes McIlhany is “personally liable to the extent the trust cannot satisfy the claim.”

⁴ McIlhany does not assert any exhibition of gender bias in the court trial itself. We have read the reporter’s transcript and agree.

women he has dated. He has not paid any housing costs--it is the women he lives with who pay for his housing. Defendant needs the money he got from Baker.”⁵

McIlhany characterizes this description of his financial arrangements as biased because the court found he was not credible based on “traits exactly identical to that of a house-wife or live-in girlfriend, . . . This reflected a negative stereotype of men in general that does not permit them to fulfill the role that women traditionally have enjoyed without stigma. The trial judge was in effect saying when a man lives at the support of women, he is less worthy of belief than a woman who does the very same thing, as even this case demonstrated, for Collins herself largely depended on the support of men.”

We disagree that these statements suggest gender bias. The trial judge fairly characterized the testimony concerning Baker’s financial situation. And as the judge noted in the final decision, McIlhany’s lack of income and financial dependence on former girlfriend and defense witness Lois Cox (and, at the time of trial, a different girlfriend) were relevant in evaluating McIlhany’s conduct while Baker was still alive and McIlhany’s need to secure financial independence.⁶ Collins, of course, had a financial motive as well. The judge as fact-finder in this court trial weighed the evidence of that financial situation, along with all the other testimony, to resolve credibility issues. That “power . . . is vested in the trial court, not the reviewing court.” (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719.)

⁵ In the final decision, the trial judge added a footnote to this statement: “Defendant claims Mr. McIlhany’s credibility was ‘not on trial.’ To the contrary, he was the main witness for the defense. It should be noted that the court’s analysis of defendant’s credibility resulted solely from observing him testifying, and from assimilating the trial facts. Defendant claims the court’s statements reflect an improper social bias because defendant was essentially a ‘house husband’ to the women he lives with. This is simply not supported by the evidence. Further, the facts are set forth in detail because they reveal Mr. McIlhany’s lack of resources, his history of shrewd manipulation and motive to lie in this trial.”

⁶ The trial court also found “the manner and circumstances under which he thrust himself into the disposition of Baker’s property” influenced the court’s opinion of McIlhany’s credibility.

McIlhany also asserts the term “lover” to describe his relationship with Cox was pejorative and unfairly brands him as a “philanderer” and Cox as “someone involved in illicit behavior.”⁷ The term, however, was consistent with Cox’s own testimony that she loved McIlhany. It does not indicate bias by the trial judge.⁸

II. Substantial Evidence Supports the Trial Court’s Judgment.

To prevail, Collins had the burden to prove by clear and convincing evidence (*Notten v. Mensing* (1938) 3 Cal.2d 469, 477) that Baker made an oral promise to leave her the Rodeo Drive property as “compensation for services rendered, or to be rendered, [but] unenforceable under the statute of frauds When an oral agreement to compensate for services by will is not fulfilled, ‘the law implies a promise to pay their reasonable value. The recovery is not on the oral agreement but on the agreement which the law implies upon the failure to perform the oral agreement.’” (*Drvol v. Bant* (1960) 183 Cal.App.2d 351, 356.)

The trial court concluded “plaintiff [was] believable and has clearly proven her case.” McIlhany’s substantial evidence argument is essentially a complaint that the trial court should not have believed plaintiff’s evidence or accorded it so much weight. But

⁷ Cox was involved in McIlhany’s preparation of the trust and will documents. She arranged for a notary to go to the hospital to witness Baker’s signatures on several occasions. The trial court summarized Cox’s testimony: “Lois Cox works at Union Bank of Subsidiaries (‘UBS’). Cox and defendant were lovers and lived together from 1993 to 1999 in her condominium. Cox paid all the bills while they lived together. Defendant paid for some of their travel and entertainment. In addition, she lent defendant money totaling approximately \$50,000 to fix his deceased mother’s home and prepare it for sale. He paid back the loans after he was able to settle his mother’s estate.”

⁸ McIlhany contends the court clerk’s telephone call to him to confirm the parties’ stipulated eviction date in his Rodeo Drive unlawful detainer action against Collins and the trial court’s decision not to hold a hearing on his objections to the statement of decision are further evidence of bias. But he concedes the stipulation was made in the unlawful detainer action and has not explained how the court’s decision not to schedule a hearing on the statement of decision issue demonstrates bias.

“[t]he sufficiency of the evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.” (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.)

Numerous witnesses testified that Baker promised the Rodeo Drive house to Collins and she acted in reliance upon that promise. After the promisor has died “those who claim as intended beneficiaries thereunder must necessarily . . . rely upon indirect evidence, including the testimony of persons . . . who have overheard references to the oral agreement.” (*Crail v. Blakely, supra*, 8 Cal.3d at p. 750.) Substantial evidence supports the trial court judgment in favor of Collins.

III. Applicability of Probate Code Sections 19400 and 19402.

McIlhany set the stage for the application of Probate Code sections 19400 and 19402 to Collins’ quantum meruit claim when he personally prepared Baker’s will and revocable living trust. California’s Trust Law (Prob. Code, § 15000 et seq.) applies to the “payment of claims, debts, and expenses from the revocable trusts of deceased settlors who died on or after January 1, 1992. (§§ 19000 et seq., 19012, subd. (a); see Stats. 1991, ch. 992.)” (*Valentine v. Read* (1996) 50 Cal.App.4th 787, 792.) Despite this clear statutory directive, McIlhany ignored the Trust Law in the trial court and continued to insist the creditors’ claims procedures applicable to decedents’ estates applied. (See, e.g., Prob. Code, § 9000 et seq.)⁹ The trial judge, however, applied Probate Code sections

⁹ For example, McIlhany asserted the claims presentation requirement as his eighth affirmative defense to the cause of action for quantum meruit. He presented no evidence to support this affirmative defense at trial.

In his request for a statement of decision, McIlhany proposed the following as a controverted issue: “Did the *failure by Collins to plead and prove she filed a creditor’s claim* in Probate Court prior to filing this civil action operate *as a bar* by virtue of Probate Code §9002[] . . . ?”

19400 and 19402 to conclude that “[he] can be personally liable [only] to the extent the trust cannot satisfy the claim.”¹⁰

Continuing to eschew the Trust Law, McIlhany argues the trial court’s action violated his due process rights by “in effect” amending the complaint and improperly imposing “statutory liability” pursuant to Probate Code sections 19400 and 19402. He insists the law pertaining to the administration of wills and decedents’ estates controls, so that Collins’ failure to file a creditor’s claim in probate defeats this action. (*Morrison v. Land*, *supra*, 169 Cal. 580; *Wilkison v. Wiederkehr*, *supra*, 101 Cal.App.4th 822.) But these decisions did not involve the Trust Law, and they provide no support for McIlhany’s contentions. We turn instead to the Trust Law.

Under the Trust Law, creditor claims are not mandatory; and in any event, they may be initiated only by the trustee and trust beneficiaries. (*Valentine v. Read*, *supra*, 50 Cal.App.4th at p. 792.) The trustee cannot be liable for failing to initiate a trust creditor claims proceeding (Prob. Code, § 19010). “If there is neither a probate proceeding nor a trust creditor claims proceeding, ‘the liability of the trust to any creditor of the deceased settlor shall be as otherwise provided by law.’ (§ 19008.) Furthermore, trust beneficiaries who have received distributions from the trust under these circumstances are exposed to personal liability. (§ 19400.) Such distributees ‘may assert any defenses, cross-complaints, or setoffs that would have been available to the deceased settlor if the settlor had not died.’ (§ 19402, subd. (a).) Their liability is limited to amounts that cannot be satisfied out of the trust estate, and to a pro rata portion of the creditor’s claim based on the proportion their distribution bears to the total distributions from the trust

He relied primarily on *Morrison v. Land* (1915) 169 Cal. 580 and this court’s decision in *Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822. In *Wilkison*, we noted that “an action for breach of contract based on an agreement to make a specific bequest in a will [¶] . . . must proceed upon the theory that [plaintiff] is a creditor of the deceased . . . [and requires] the presentation of claims to the executor or administrator.” (*Id.* at pp. 833-834; see also Prob. Code, § 9002.)

¹⁰ Evidence at trial established the trust estate was valued at many times more than the \$111,124 judgment.

estate. (§ 19402, subd. (b).)” (*Valentine, supra*, 50 Cal.App.4th at p. 793.) In summary, the *Valentine* court noted, “When no creditor claims proceeding is filed, the Legislature contemplated satisfaction of creditors’ claims first from the trust estate, and then from beneficiaries who receive distributions from the trust.” (*Id.* at p. 794.)

In *Valentine*, as here, plaintiffs recovered in quantum meruit for services they provided during the lifetime of the settlor of a revocable living trust. And, as in this case, the Probate Code trust creditor claims procedures had not been invoked. The judgment held defendants, the trustee and his spouse, “individually liable to the extent they received assets distributed from the trust” and imposed a constructive trust on those distributions. (*Valentine, supra*, 50 Cal.App.4th at p. 791.) Defendants objected to the judgment, asserting “there was no showing of any wrongful taking to support a constructive trust”; defendant trustee was not a beneficiary; and the trial court excluded evidence of any distributions to the defendant spouse, who was a trust beneficiary. Without that evidence, there was no way to determine the spouse’s “proportional share of the trust distributions” pursuant to Probate Code section 19402. (*Ibid.*)

The Court of Appeal reversed the judgment insofar as it imposed a constructive trust and individual liability on the trustee who was not a trust beneficiary. Otherwise, it affirmed the trustee’s liability in his capacity as trustee and the trust beneficiary’s liability on a pro rata basis per Probate Code section 19402. (*Valentine, supra*, 50 Cal.App.4th at p. 796.) The matter was remanded for a determination of the trust beneficiary’s liability under that statute. Along the way, the Court of Appeal also noted “the other [trust] beneficiaries were not actually exposed to any liability because the [plaintiffs] did not join them as defendants.” (*Id.* at p. 793.)

McIlhany, unlike the trustee in *Valentine*, is also a beneficiary. Also unlike the *Valentine* defendants, he did not attempt to establish the proportionate value of trust distributions to himself and did not assert the affirmative defenses available to him in Probate Code section 19402. He waived those issues by failing to raise them in the trial court. Nonetheless, the trial judge applied both Probate Code sections 19400 and 19402

to his benefit and determined “[he] can be personally liable [to plaintiff only] to the extent the trust cannot satisfy the claim.”¹¹ There was no error.

DISPOSITION

The judgment is affirmed. Collins is awarded her costs on appeal.

NOT TO BE PUBLISHED.

DUNNING, J.^{*}

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

¹¹ Evidence at trial established the trust estate was valued at many times more than the \$111,124 judgment.

^{*} Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.